91-1428

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAILROAD COMMISSION OF TEXAS, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX A

MISSOURI PACIFIC RAILROAD COMPANY, et al., Plaintiffs-Appellees/Cross-Appellants,

v.

RAILROAD COMMISSION OF TEXAS and its members, et al., Defendants-Appellants/Cross-Appellees.

No. 90-8574.

United States Court of Appeals, Fifth Circuit.

December 6, 1991.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, JOLLY, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In this case, we decide whether the Tex. Admin. Code tit. 16, § 5.619, which requires railroads to construct and maintain walkways adjacent to railroad trackage in accordance with certain specifications, is preempted by the Federal Railroad Safety Act of 1970 (the Act), 45 U.S.C. § 421 *et seq.* The district court held that the state walkway provision was preempted, and we now affirm.

I.

In 1986, the Railroad Commission of Texas (the Commission) adopted section 5.619 pursuant to Tex. Rev. Civ. Stat. Ann. art. 6448a, which authorizes the Commission "to perform any act and issue any rules and orders as permitted by" the Act. The railroads filed this action against the Commission, seeking the invalidation of a series of rail safety regulations, including section 5.619. The railroads alleged, *inter alia*, that the regulations were preempted by federal law, constituted an undue burden on interstate commerce, and were arbitrary, capricious, and not supported by substantial evidence. The district court granted the railroads' motion for partial summary judgment, 653 F. Supp. 617, holding that the regulations were preempted by federal law.

On appeal, we affirmed the district court's decision except as applied to section 5.619. *Missouri Pacific R.R. v. Railroad Comm'n*, 833 F.2d 570 (5th Cir. 1987) (*MoPac I*). We held that summary judgment was inappropriate with regard to section 5.619 because there existed "a material fact issue concerning the interrelationship between the state walkway requirement and federal track regulations." *Id.* at 575. We therefore remanded the case for trial on this issue.

By stipulation, the parties agreed that the case would be tried to the court solely on documentary evidence. After considering all the evidence, the court concluded that section 5.619 was preempted by federal law and dismissed the remaining claims as moot. The Commission now appeals the court's conclusion on the preemption issue; the railroads cross-appeal the dismissal of their remaining claims.

II.

We review the court's legal conclusions *de novo* and its factual findings for clear error. Fed. R. Civ. P. 52(a); *Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1058 (5th Cir. 1991).[1] More specifically, we will reject the district court's factual findings "only if our review of the entire record impels the definite and firm conviction that a mistake has been committed." *Carr*, 931 F.2d at 1058 (citation omitted). This standard is a deferential one: If the district court's account of the evidence is plausible in light of the whole record, we may not reverse it even though we would have weighed the evidence differently had we been sitting as the trier of fact. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). *See also Houston Oil & Minerals Corp. v. American Int'l Tool Co.*, 827 F.2d 1049, 1055 (5th Cir. 1987), *cert. denied*, 484 U.S. 1067, 108 S.Ct. 1031, 98 L.Ed.2d 995 (1988).

III.

Section 5.619(a)(1) mandates the construction of walkways "alongside a railroad track or railroad switch for the purpose of providing an area for a railroad employee to perform duties associated with that track." The walkways

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[1] In a case cited by the railroads, we noted that "the degree of deference to be accorded a district court's findings of fact is lower when the case is submitted wholly on documents than in the situation where the evidence is presented by witnesses appearing before the district court." *Bull's Corner Restaurant v. Director of the Fed. Emergency Management Agency*, 759 F.2d 500, 502 (5th Cir. 1985) (quoting *Onaway Transp. Co. v. Offshore Tugs, Inc.*, 695 F.2d 197, 200 (5th Cir. 1983)). *Bull's Corner*, however, was decided before the 1985 amendment to rule 52(a), which now reads, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous...." *See also McFarland v. T. E. Mercer Trucking Co.*, 781 F.2d 1146, 1148 (5th Cir. 1986) (*Bull's Corner's* distinction no longer valid given 1985 amendment).

are to extend a minimum of six feet from the "outside end of the crossties." §5.619(d). The state regulation also specifies the surface condition, slope, and location of the walkways. *See* §5.619(b), (c) & (e).

No federal regulation directly addresses or requires the construction of walkways. Federal regulations do, however, govern the roadbed and track support materials to which the walkways would be attached. 49 C.F.R., subparts B & D.[2] As we noted in *MoPac I*, "[l]iterally and figuratively, the walkways required by the state regulations sit atop and adjoin the roadbed for which [federal regulation] has prescribed minimum specifications." 833 F.2d at 574.

When, as in this case, a state's exercise of its police power is challenged under the Supremacy Clause, we start with the assumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) (citations omitted). The purpose of Congress can be found in the language of the FRSA, which declares that

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[2]The roadbed is the area of soil that supports the ballast, which is the "permeable, granular materials such as sand, gravel, crushed rock or slag, chat, cinders, and so on placed around and under the ties to promote track stability." William W. Hay, *Railroad Engineering*, 393 (2d ed. 1982). Under federal regulations, the roadbed and "areas immediately adjacent to [the] roadbed" must be maintained in order to prevent vegetation and drainage problems. 49 C.F.R. §§ 213.31, 213.33, 213.37. The ballast must "[t]ransmit and distribute the load of the track and railroad rolling equipment" to the roadbed; "[r]estrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails"; "[p]rovide adequate drainage for the track"; and "[m]aintain proper track cross-level, surface, and alinement." 49 C.F.R. §§ 213.103(a), (b), (c) & (d).

> laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard *covering the subject matter of such State requirement*. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety *when necessary to eliminate or reduce an essentially local safety hazard*, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (emphasis added). Thus, whereas section 434 mandates national railroad safety standards "to the extent practicable," it permits states to regulate in two situations.

The first is where "no federal standard has yet been adopted 'covering the subject matter' of the state regulation." *MoPac I*, 833 F.2d at 573. The second is where the state seeks "to eliminate or reduce 'an essentially local safety hazard'" *Id.*

In *MoPac I*, we addressed section 5.619 in the former context. *Id.* at 573 n. 2. We stated that railroad walkways would be "subject matter" that was "covered" by federal regulation "if, from a practical standpoint, the width, surface and slope requirements of the state walkway regulation generally add to the [federal] standards by requiring the railroad to strengthen or enlarge the roadbed beyond [federal] requirements." *Id.* at 575 (footnote omitted).

On remand, the district court found that section 5.619 was preempted because the requirements of the walkway provision would in fact add to the federal standards. In the alternative, the court held that section 5.619 could not be justified as addressing a "local safety hazard" because the regulation has statewide application.

We first address the district court's holding that section 5.619 adds to federal requirements, and then turn to its alternative holding. Finally, we address the parties' remaining grounds for error, including the railroads' cross-appeal.

IV.

A.

We asked the district court on remand to answer the following question: whether the state walkway specifications "requir[e] the railroad to strengthen or enlarge the roadbed beyond [federal] requirements." *MoPac I*, 833 F2d at 575. The district court held that "the roadbed would, in fact, have to be enlarged laterally and strengthened in order to support the walkway." It went on to state that "the body of material used to support the walkway would have to adjoin the roadbed in such a way that it would be integrated with it and, in essence, merely become an extension of it."

The district court based its conclusion in part upon testimony provided by the railroads' expert, Robert E. Ahlf, a railroad engineering consultant who had collected data on the trackage affected by the walkway regulation. He concluded that in order to accommodate the walkways required by section 5.619, the track support structures would have to be enlarged in approximately forty percent of the trackage on which walkways would be built. The court also relied upon caselaw from other jurisdictions in

which courts have held that state regulations covering walkways are preempted by federal regulations on the ground that walkways are an integral part of track support structures.[3]

The Commission contends that its evidence effectively rebuts the evidence presented by the railroads, and that therefore we should reverse the district court's finding that the roadbeds and track support structures would have to be enlarged beyond federal requirements in order to accommodate the walkways. The Commission essentially reargues the evidence it presented to the district court. For example, the Commission points to the fact that its expert, Dr. W. Ronald Hudson, a transportation engineering professor, testified that walkways are not an integral part of the track structure because they do not bear the load created by the train traffic. They also refer to testimony by another Commission witness, Vence L. Haggard, a railroad safety inspector for the Commission, who stated that the federal regulations apply only to the traffic-bearing portions of the roadbed.

The Commission must show, however, that the district court clearly erred. This it cannot do. There is nothing in our review of the record that leaves us with "the definite and firm conviction that a mistake has been

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[3]*See Norfolk & Western Ry. v. Burns*, 587 F.Supp. 161, 170 (E.D. Mich. 1984) (state occupational safety and health regulations along walkways preempted by FRSA); *Black v. Baltimore & Ohio R.R.*, 398 N.E.2d 1361 (Ind.Ct.App. 1980) (allegations of muddy conditions in areas adjacent to track based upon state law claims preempted by FRSA); *Black v. Seaboard System R.R.*, 487 N.E.2d 468 (Ind.Ct.App. 1986) (state standards for construction and maintenance of walkways preempted by FRSA). ***But see Illinois Cent. Gulf R.R. v. Tennessee Pub. Serv. Comm'n***, 736 S.W.2d 112 (Tenn.Ct.App. 1987) (state walkway regulations not preempted by FRSA); *Southern Pac. Transp. Co. v. Public Util. Comm'n*, 647 F.Supp. 1220 (N.D.Cal. 1986), *aff'd per curiam*, 820 F.2d 1111 (9th Cir. 1987) (same).

committed." *Carr*, 931 F.2d at 1058. In this case, the district court found the evidence presented by the railroads' expert to be "more persuasive" and "more credible" than that presented by the Commission's experts. Although both the Commission and the railroads presented convincing evidence, we cannot "reverse the trial court's selection" where "there are two or more permissible views of the record evidence." *Houston Oil*, 827 F.2d at 1055 (citation omitted).

B.

The district court also found that the construction of walkways would impair drainage and weaken the track support structures. Federal regulations require that the track be supported by material that will "[t]ransmit and distribute the load of the track and railroad rolling equipment to the [roadbed]" as well as "[p]rovide adequate drainage for the track." 49 C.F.R. §§ 213.103(a) & (c). In essence, the court held that the walkway provision would not only "add" to federal requirements, it would actually contravene them.

Both the railroads and the Commission produced expert testimony on this issue. Ahlf testified that the railroads generally use large-diameter stone material under the tracks because such material provides greater support for the train traffic and maximum drainage capability. According to Ahlf, the smaller material mandated by the state walkway regulation[4] would, during regular maintenance

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[4]Section 5.619(b)(2) requires that walkways be surfaced with "crushed materials not to exceed 1 1/2 inches in size or with asphalt, concrete, secured planking, grating, or similar material." Ahlf testified that railroads generally used much larger material to support the track. Although the state regulation allows the railroads to use material other than crushed stone under the walkways, one of the Commission's experts (Hudson) conceded that as a practical matter crushed stone is

procedures, mix with the larger material under the track. This, Ahlf concluded, would cause drainage problems and weaken the ability of the track structure to support train traffic.

Hudson testified that there would be no drainage problem because the material used in constructing the walkways would be permeable. The Commission concludes from this that any impediment would only be "hypothetical," "much in this same sense that a sieve acts as a hypothetical impediment to water poured through it." The Commission's expert also noted that the track structure and roadbed would be weakened only if the railroads continued to use their current maintenance procedures, which should be disregarded because such procedures "are wholly in the hands of the railroads."

Again, the district court found the railroads' expert to be more convincing. Again, we cannot say that the district court's choice is clearly erroneous. Moreover, the issue is somewhat beside the point. Even if the addition of walkways did not create drainage problems or weaken the roadbed, the state provisions would still require the railroads to enlarge and strengthen existing roadbeds to accommodate the walkways--which is enough to support a finding of preemption under our analysis in *MoPac I*.

C.

The Commission also maintains that the district court impermissibly considered the cost to the railroads of constructing these walkways. It points to the court's statement that "[i]t is a specious argument to say simply that section 5.619 merely requires a walkway and that it is up to the railroads to comply by whatever means or cost

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the material most likely to be used.

necessary." The court, however, was merely responding to the Commission's argument that, as the court phrased it, "the walkway requirement is a rule with independent application from the federal regulations and that compliance with the walkway rule would have no impact on compliance with the federal regulations."

In essence, the district court was suggesting that regardless of whether it was theoretically possible to comply with both federal and state regulations, the state walkway requirement would still have a practical impact on compliance with federal regulations in that it would require the railroads to enlarge or strengthen the track support structures beyond federal requirements. Thus, while the district court did consider the structural changes that were necessary for the railroads to comply with the state's walkway regulation in light of the current material composition of its track-support structures and the procedures used to maintain them, it did not consider the cost of enlarging these structures *per se*. Thus, we do not find that the district court impermissibly relied upon cost of compliance.

D.

Finally, the Commission complains that it was "reversible error" for the district court to have relied upon a 1978 Policy Statement by the Federal Railroad Administration (FRA), the government agency that enforces the FRSA. The policy statement delineates the respective responsibilities of the FRA and the Occupational Safety and Health Administration (OSHA) with regard to railroad safety matters. It states that OSHA should not regulate "walkways beside the tracks in yards or along the right-of-way" because

> [t]hese are areas which are so much a part of the operating environment that they must be

> regulated by the agency with the primary responsibility for railroad safety. Therefore, FRA will determine the need for and feasibility of general standards to address individual hazards related to such surfaces, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs.

43 Fed.Reg. 10,583, 10,587 (1978).

In a 1986 opinion letter, the Chief Counsel of the FRA stated that section 5.619 was preempted by federal regulation because the subject matter had been covered by federal regulation. The Chief Counsel relied upon the 1978 Policy Statement. The district court noted the existence of both documents in summarizing the railroads' evidence.[5]

The Commission argues that the court's reliance upon the policy statement was improper because we "specifically rejected" it in *MoPac I*. In *MoPac I*, we did reject the railroads' reliance upon the policy statement to show that federal regulation preempted section 5.619 because the FRA had failed to promulgate regulations with regard to walkways. The railroads argued that the "FRA, by declining to promulgate various walkway regulations in the past, has specifically intended to 'cover the subject matter' of walkways so as to preempt state regulations." 833 F.2d at 575. We rejected this reasoning, noting that

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[5]The district court mentioned the policy statement after noting that there had been a great deal of practical involvement of the FRA in inspecting areas adjacent to the roadbeds. The railroads submitted evidence showing that the FRA has regulated walkway conditions on at least two recent occasions in Texas. The district court concluded from this, as well as from the policy statement, that while the FRSA does not specifically refer to walkways, the FRA has asserted jurisdiction over this area of railroad safety.

the FRA in its statement seemed to be saying "we haven't looked at walkways yet" rather than "we haven't done anything because we have determined it is appropriate to do nothing." *MoPac I*, 855 F.2d at 576. Thus, we concluded that "the FRA's statement implies that unless walkway regulations are otherwise preempted, e.g., by FRA track and roadbed regulations that 'cover the subject matter,' § 434 could authorize state regulation until the FRA acts." *Id.*

Thus, in *MoPac I* we rejected the use of the FRA policy statement only to the extent that the railroads utilized it in an attempt to show that state walkway regulations were preempted because the FRA had failed to act on the subject. We did not say, however, that the statement could not be used to show that the state regulations would be preempted if the FRA chose to act. That is what the district court found in this case when it held that the roadbeds would have to be extended beyond federal specifications in order to accommodate the walkways. We therefore reject the Commission's suggestion that the "district court's decision is irreparably tainted" by its consideration of the policy statement and opinion letter.

V.

After concluding that the state walkway provision would be preempted under the section 434 because federal regulations had covered the subject matter, the district court went on to find in the alternative that the provision could not be justified as addressing a "local safety hazard." Under section 434, a state may adopt "an additional or more stringent law, rule, regulation, order, or standard" when such state regulation (1) is "necessary to eliminate or reduce an essentially local safety hazard"; (2) is "not incompatible with" federal regulations; and (3) does not create "an undue burden on interstate commerce." 45 U.S.C. § 434; *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.),

cert. denied, 414 U.S. 855, 94 S.Ct. 157, 38 L.Ed.2d 105 (1973). The district court held that the walkway provision failed the first prong of the test because it is applicable statewide and therefore could not address a "local" safety hazard. The court also noted that the state provision would fail the second prong of the test as well because it would, *inter alia*, "impede the drainage capability of the track structure."

The Commission claims that the court erred in considering the "local safety hazard" exception in this instance. It argues that it has "always conceded that the walkways rule has statewide application" and that it has not attempted to justify the regulation under the "local safety hazard" test of section 434. We noted this fact in *MoPac I*, where we stated that "the Commission does not seek to justify the challenged regulations under the [local hazard] alternative, and we shall therefore not discuss it." 833 F.2d at 573 n. 2. Our position is the same today. Because we rest our affirmance on the district court's finding that the walkway provision would require railroads to enlarge track support structures beyond federal requirements, we need not and do not reach the propriety of the district court's alternative holding.

The Commission responds by requesting us to "strike the [district court's] further finding that the regulation is incompatible with federal regulations" on the ground that such a finding "could prevent the Commission from requiring a safe working area in a specific location...." We decline to take such action. We do, however, note that the lower court's finding on the issue of incompatibility is an alternative holding, and we leave it to future courts to treat it accordingly.

VI.

[9] The Commission also asks us to reconsider our earlier decision in *MoPac I* to use a "practical" factual test for determining the meaning of the phrase "covering the subject matter of such State requirement" found in section 434. It contends that our panel's test ignores the plain language of this section as determined by the Ninth Circuit in *Southern Pac. Transp. Co. v. Public Util. Comm'n*, 647 F.Supp. 1220 (N.D.Cal. 1986), *aff'd per curiam*, 820 F.2d 1111 (9th Cir. 1987); our circuit's preemption principles as described in *Burlington N.R.R. v. Public Util. Comm'n*, 812 F.2d 231 (5th Cir. 1987); congressional intent as indicated in the hearings on the FRSA; and with the Supreme Court's decisions on the federal preemption of state regulations.

We see no reason to reconsider our earlier decision. First, we considered and rejected the Commission's arguments in *MoPac I*. Second, as the railroads correctly point out, the Commission did not appeal our *MoPac I* decision. Finally, it is a "well known and longstanding rule of decision in this circuit that one panel cannot overrule another." *Samaad v. City of Dallas*, 922 F.2d 216, 219 (5th Cir. 1991) (footnote omitted). We therefor reaffirm our holding in *MoPac I*.

VII.

[10] On their cross-appeal, the railroads contend that the district court erred in not ruling on their remaining causes of action. This argument is without merit. In *MoPac I*, we stated that "[i]f the district court determines that the state walkway regulation is not preempted under the foregoing standard, it must then consider the railroads' remaining arguments concerning the walkway regulation not addressed in its original opinion." 833 F.2d at 576. Because the district court found that section 5.619 is

preempted, it did not need to reach the railroads' additional causes of action. The district court's dismissal of those remaining claims therefore was proper.

VIII.

In sum, the district court's finding that section 5.619 would require the railroads to enlarge or strengthen existing roadbeds to accommodate walkways is not clearly erroneous. We therefore AFFIRM its decision that section 5.619 is preempted by federal regulation based upon our preemption analysis set forth in *MoPac I*. Because we affirm the court's decision on this ground, we decline to reach the propriety of the district court's alternative holding that section 5.619 cannot be justified as addressing a "local safety hazard" under 45 U.S.C. § 434. We also decline to reconsider the preemption analysis we set forth in *MoPac I*. Finally, with regard to the railroads' cross-appeal, we AFFIRM the district court's dismissal of their remaining causes of action.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8574

D.C. Docket No. A-86 CA 406

MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,

Plaintiffs-Appellees
Cross-Appellant,

versus

RAILROAD COMMISSION OF TEXAS
and its members, et al.,

Defendants-Appellant
Cross-Appellees.

Appeals from the United States District Court for the Western District of Texas

Before WISDOM, JOLLY and SMITH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants cross-appellees pay to plaintiffs-appellees cross-appellants the costs on appeal to be taxed by the Clerk of this Court.

December 6, 1991

ISSUED AS MANDATE: Dec. 30, 1991

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

MISSOURI PACIFIC	§	
RAILROAD, CO., ET AL.	§	
	§	
VS.	§	CIVIL NO. A-86-CA-406
	§	
RAILROAD	§	
COMMISSION	§	
OF TEXAS, ET AL.	§	

ORDER

This cause came before the Court on remand from the Fifth Circuit Court of Appeals for a trial on the merits. On July 22, 1986, Plaintiffs filed their Complaint in this Court seeking declaratory and injunctive relief. The Defendants timely answered, and on October 1, 1986, the Plaintiffs filed their motion for partial summary judgment. The Court granted the motion for partial summary judgment on January 27, 1987, which was published as *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 653 F.Supp. 617 (W.D. Tex. 1987), and the Defendants appealed. The Fifth Circuit reversed and rendered in part, affirmed in part and reversed and remanded in part. *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570 (5th Cir. 1987).

The Fifth Circuit reversed and remanded on the issue of whether 16 Tex. Admin. Code § 5.619, requiring

the construction of walkways in areas on or immediately adjacent to the railroad track roadbed, is preempted by federal regulations regulating the roadbed, track geometry and track structure. Specifically, the Fifth Circuit found that summary judgment was improper because there was a material issue of fact concerning "the interrelationship between the state walkway requirement and federal track regulations." *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570, 575 (5th Cir. 1987).

By Amended Complaint, filed on August 19, 1988, Plaintiffs have asserted five causes of action, alleging: (1) that the walkway rule is preempted by the Federal Railroad Safety Act, 45 U.S.C. §§ 421-441, and its attendant regulations, by total federal occupation of the subject matter; (2) that the walkway rule is preempted by the Federal Railroad Safety act and its attendant regulations by failure to address a local safety hazard; (3) that the walkway rule is preempted by the Federal Railroad Safety Act and its attendant regulations for creation of an undue burden on interstate commerce; (4) that the walkway rule is constitutionally impermissible for creation of an undue burden on interstate commerce; and (5) that the Commission's adoption of the walkway rule was an arbitrary and capricious action, unsupported by substantial evidence.

The Plaintiffs' first four causes of action seek essentially the same relief, a declaration by this Court that the Texas walkway rule is preempted by federal law, and an injunction against its enforcement. Only the rationale for each of the first four causes of action differs.

On January 16, 1989, the parties submitted trial briefs in anticipation of a trial before the Court. On January 19, 1989, the parties filed a Stipulation By All Parties, stating that they were in agreement that "[t]he nonjury trial on the merits of this cause [would] be submitted solely on written documentation" of evidence,

including affidavits or verified statements, depositions, exhibits, interrogatories, requests for admissions and response thereto. The Court signed the stipulation and requested that the parties submit final arguments, which were to include the parties' evaluation of the evidence submitted.

On August 23, 1990, a hearing was held, during which the parties were given an opportunity to orally evaluate their own and their opponent's evidence and present oral argument on the issues of law before the Court. At the conclusion of the hearing, the parties were asked to submit proposed findings of fact and conclusions of law in support of their relative positions.

In the first subsection of this opinion, the Court will first discuss generally the issue of preemption as it applies to this case. In the following subsections, the Court will make findings of fact and conclusions of law based on all the documented evidence and legal arguments presented to the Court.

I. PREEMPTION

The Supremacy Clause, U.S. CONST. art. VI, cl. 2, nullifies state laws that "interfere with or are contrary to" federal law. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C.J.). Congress is authorized to absolutely preempt state rulemaking authority in a particular area. *Pacific Gas & Electric Co. v. State Energy Resources Commission*, 461 U.S. 190 (1983). Thus, if it appears that the federal statutes and related regulations in this case completely occupy the field of rail safety, including roadbed, track structure and walkways, all state regulation in this field would be preempted. The operative federal statute relating to this issue is the Federal Railway Safety Act ("FRSA"), 45 U.S.C. § 421-441. In the

FRSA, Congress specifically declared that regulations relating to railroad safety shall be nationally uniform "to the extent practicable." Section 434 of the FRSA provides:

> The Congress declares that laws, rules, regulations orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Under the terms of section 434, if, in light of Congressional policy and FRA actions, there is a national rule, regulation, order or standard that has been adopted "covering the subject matter" of the state regulation, section 5.619 is preempted. If federal legislation and regulations merely address rail safety matters, but do not wholly occupy the field, section 5.619 would be permitted only if: (1) necessary to eliminate or reduce an essentially local safety hazard; (2) not incompatible with any federal provision; and (3) not creating an undue burden on interstate commerce. The state would be required to establish each of the elements of this narrow exception in order to avoid preemption.

II. PLAINTIFFS' FIRST CAUSE OF ACTION

Addressing Plaintiffs' first cause of action, the Court must determine from the evidence and arguments presented whether 16 T.A.C. § 5.619 is preempted by a total federal occupation of the field, or more specifically whether the FRSA and its attendant regulations, 49 C.F.R. part 213, have "covered the subject matter" of section 5.619.

In the appeal of this case, the Fifth Circuit took a pragmatic as well as a legal approach in addressing whether a national rule, regulation, order or standard has been adopted "covering the subject matter" of the challenged state regulation. 833 F.2d at 573, 574. In remanding the case, the Fifth Circuit stated, "if, from a practical standpoint, the width, surface and slope requirements of the state walkway regulation generally add to the FRA standards by requiring the railroad to strengthen or enlarge the roadbed beyond FRA requirements . . . we [would] hold that the federal regulation has 'covered the subject matter' of track composition and design and that the state regulation conflicts with § 434's purpose to foster national rail safety standards 'to the extent practicable.'" 833 F.2d at 575. This Court, then, in determining whether federal law covers the subject matter of section 5.619, must determine from the evidence before it whether, from a practical viewpoint, the state walkway rule would have the effect of adding to the FRA standards by requiring the railroads to strengthen or enlarge the roadbed beyond the FRA requirements.

Section 5.619 requires the construction of walkways in areas on or immediately adjacent to the roadbed. By definition, these walkways shall be constructed "alongside a railroad track or railroad switch . . .." 16 T.A.C. § 5.619(a). Section 5.619 subsection (b) states:

> Walkways shall be located along tracks in yards, terminals, and at other points where switching, car spotting, or train or car inspections may reasonably be expected to be performed during the normal course of business.

16 T.A.C. § 5.619. Walkway surface slope and width specification are established in subsections (c), (d) and (e). Subsections (f), (g), (h) and (i) detail specific locations where walkways are required.

The walkways required by state regulations sit atop and adjoin the roadbed for which FRA has prescribed minimum specifications. The FRA has adopted comprehensive regulations that govern standards for the roadbed, track geometry and track structure, and specifically covers areas "adjacent to the roadbed" as well as track gauge, alignment, surface, ballast, drainage and component parts. 49 C.F.R. 213.31-213.143 (1989).

A. Plaintiffs' Evidence

Plaintiffs have submitted the report of Robert E. Ahlf to demonstrate the engineering and economic impact of § 5.619 on the Texas Class I railroads. Mr. Ahlf is a self-employed Railway Development Consultant who obtained a Bachelor of Science degree in Civil Engineering in 1966 from the University of Florida and a Master of Science degree in Transportation, which included a minor in Railway Civil Engineering, in 1968 from the University of Tennessee. Mr. Ahlf's postgraduate emphasis on Railway Civil Engineering was under the tutelage of Dr. W. W. Hay, nationally recognized as the primary contemporary authority in American railway engineering.

After obtaining his postgraduate degree, Mr. Ahlf spent seventeen years with the Illinois Central Gulf railroad,

working his way up through positions including Assistant Division Engineer and Chief Operations Planner. During the last ten years with the ICG railroad, Mr. Ahlf's duties included direct field responsibilities for rehabilitation of hundreds of miles of mainline track through open country and through yards and cities; he also was responsible for the basic field engineering and design to rehabilitate and reconfigure two major ICG yards and its main thoroughfare trackage in Jackson, Mississippi.

Since leaving the ICG in 1985, Mr. Ahlf has been retained on several occasions to evaluate design and costs of rehabilitation projects on various railroads, including industry trackage. Mr. Ahlf has also served as committee chairman for a research project for the Association of American Railroads entitled "Ballast and Subgrade Interaction Considerations - Report No. AP139," published by the AAR Technical Center for the Research and Test Department of the AAR in December of 1988. In short, Mr. Ahlf's entire professional career has centered on railroad engineering, including analysis, design, field supervision, economic justification and preparation of specifications and contracts.

Mr. Ahlf's report is based on extensive factual data contained in survey forms and verified statements prepared by railroad operator witnesses. The Court is in possession of these verified statements and survey forms submitted by R. D. Bredenberg, Gary Lilly, J. B. Miller, Donald M. Tate, and Larry Fields.

Mr. Ahlf explains in his report that the basic components of track structure are the rail, ties, ballast and subgrade (or roadbed).[6] The roadbed supports the ballast,

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[6] The term "ballast" refers to a "permeable, granular material such as sand, gravel, crushed rock, or slag, chat, cinders, and so on, placed around and under the ties to promote track stability." William W. Hay,

including the ballast outside the ends of ties, which provides lateral restraint to the tie/rail structure. Railroads are designed and built to be perpetually renewed by maintenance on a cyclical basis, with individual components replaced periodically and the track lifted and surfaced on new stone ballast, according to Mr. Ahlf.

In Mr. Ahlf's opinion, railroads utilize large, open-voided stone ballast because such large ballast affords greater strength for the lateral, vertical and horizontal forces of rail traffic and maximum drainage capability. Track structures must not only drain water away from the ties and rails so as to prevent the softening of the roadbed, but must also provide for the escape of abraded materials, the fine materials created by the rubbing together of the ballast materials caused by rail traffic. Retention of these abraded materials around ties clogs the voids between ballast stone, tending to trap water in the track structure, according to Mr. Ahlf.

Mr. Ahlf claims that the walkway rule would require the use of a smaller size ballast than that generally used by the railroads, and that routine maintenance will cause the smaller walkway material to become mixed with the ballast material under the track, to the detriment of the track structure. The smaller walkway material, he explains, will adversely affect the drainage of the track structure. Without proper drainage, the track structure is softened and, thus, weakened.

Mr. Ahlf also explains that in at least 41% of the trackage on which walkways would have to be built, the track structure itself would have to be enlarged in order to support the walkway structure. According to this expert, walkways would extend six feet from the end of the railroad

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Railroad Engineering, 1983, 2nd ed. page 393.

tie on both sides of the track, requiring that the roadbed and ballast be enlarged outwardly, substantially in excess of FRA requirements. His report also states that the enlargement of the roadbed and ballast would have to be compatible with the existing roadbed and ballast in such a way as to make them structurally integrated with the existing roadbed and ballast.

In sum, Mr. Ahlf concludes, that the walkway rule would require the strengthening and enlargement of the existing roadbed in a manner that would make the walkway structurally integrated with the existing roadbed and track structure; and the use of material in the walkway, which, in time, would weaken the railway's ability to handle rail traffic stress and provide adequate drainage capability.

Plaintiffs also submitted an opinion letter from the Chief Counsel of the U.S. Department of Transportation, Federal Railroad Administration, Mr. John M. Mason, concluding that the FRA has acted so as to occupy the subject matter of section 5.619. Mr. Mason cites 49 C.F.R. 213 as an FRA provision that prescribes minimum requirements for areas "immediately adjacent" to the roadbed, which although not expressly addressing walkways, would include the walkway area as an area immediately adjacent to the roadbed. He further argues that the FRA currently requires the correction of defective walkways on signal structures under the authority of the Signal Inspection Act. 49 U.S.C. § 26(e).

Plaintiffs have also submitted a 1983 FRA Safety Assessment of Plaintiff, Southern Pacific Transportation Company's Englewood Yard in Houston, and a 1983 Special Assessment of Plaintiff, the Atchison, Topeka and Santa Fe Railway Company's Southern Division, both of which, according to Plaintiffs, demonstrate the FRA's practical involvement in the correction of unsafe existing walkways

pursuant to their jurisdictional authority under the Federal Railroad Safety Act.

Chief Counsel, Mr. Mason, also cites to a Policy Statement in which the FRA expressed its policy that other government entities should be precluded from exercising jurisdiction with respect to areas beside the tracks in yards or along the right-of-way. This area would include the area occupied by walkways. The following is an excerpt from the FRA's policy statement:

> These are areas which are so much a part of the operating environment that they must be regulated by the agency with the primary responsibility for railroad safety. Therefore, FRA will determine the need for and feasibility of general standards to address individual hazards related to such surfaces, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs.

Policy Statement of Termination of Rulemaking on Railroad Occupation Safety and Health Standards, 43 Fed. Reg. 10, 583, 10,587 (1978).

Plaintiffs argue that, while not controlling, advisory opinions by officers of a federal agency are "entitled to great deference." *Regents of the University of California v. Public Employment Relations Board*, 139 Ca. App. 3d 1037, 1042, 189 Cal. Rptr. 298, 301 (Cal. Ct. App. 1983), *appeal after remand* 182 Cal. App. 3d 71, 227 Cal. Rptr. 57 (Cal. Ct. App. 1986), *review denied* 1986 (citing *Udall v. Tallman*, 380 U.S. 1 (1965)).

(B) Defendants Evidence

Defendants offered the report of Dr. W. Ronald Hudson, who is the Dewitt C. Greer Centennial Professor of Transportation Engineering, in the Department of Civil Engineering at the University of Texas. Dr. Hudson obtained his Bachelors degree in Civil Engineering from Texas A & M University in 1954. He was selected as recipient of the Humble Fellowship in Civil Engineering and completed his Master's degree in Soil Mechanics in 1955. In July of 1955, he entered the U.S. Air Force and spent the next two years as a field engineer in the Air Defense Command doing varied field engineering work in the general area of Civil Engineering. Following the completion of his military service, he went to work as a Soils Engineer for S.J. Buchanan and Associated in Bryan, Texas. In 1958, he accepted employment as the Assistant Chief of the Rigid Pavement Research Branch at the AASHO Road Test (American Association of State Highway Officials) in Ottawa, Illinois. Completing that job, in 1961, he was employed with the service of the Texas Highway Department, where he worked as a supervising and designing engineer for two and a half years, while working on his doctoral degree. His doctoral degree was earned under Professor Hudson Matlock at the University of Texas in the field of engineering mechanics. In 1963, he entered the teaching/research profession at the University of Texas at Austin and has continued in that profession until the present. He is regularly requested as a lecturer all over the world. He is also currently the Technical Director/Manager of a major $6 million project for the $150 million Strategic Highway Research Program. His main areas of expertise are systems analysis, bridge management, load carrying theory and practice in civil engineering, including embankments and roadbeds with primary application in the highway field.

Defendants also presented evidence in the form of verified statements from Mr. Paul W. King, a regulatory analyst for the California Public Utility Commission; Mr. Robert W. Farnsworth, rail safety planner for the Railroad Commission of Texas; and, Mr. Vence L. Haggard, a federally certified Railroad Safety Inspector for the Railroad Commission of texas.

Dr. Hudson, in his verified statement, claims that walkways would not be an integral part of the track structure. From a general engineering point of view, he explains, a walkway could be added or removed from an existing track structure without affecting the load bearing capacity of the track. With respect to the issue of drainage, Dr. Hudson states that the key to good drainage is the use of "open grade" stone, or stone that is all about the same size, and that walkways constructed of such crushed stone, not exceeding 1-1/2" in diameter, would provide exemplary drainage. He claims that stone graded from 1" to 1-1/2" is so permeable that water flows through it at the rate of nearly four miles (20,000') per day. Thus, water that falls on the track would only be in contact with the walkway material less than one minute before draining safely away from the track structure. This type of drainage, Dr. Hudson states, is not only adequate, as required by the federal regulations for track structure, but is excellent.

Dr. Hudson states that walkway stone would not be subject to the dynamic pumping from trains that the ballast stone receives and, thus, would exceed the drainage capabilities of the adjoining track structure. He claims that the issue of whether periodic maintenance of tracks with walkways will adversely affect the ballast structure is wholly in the hands of the railroads, and that if mixing the walkway material with ballast during removal for ballast cleaning is detrimental to the ballast, the railroads simply should not do so. At his deposition, Dr. Hudson suggested that a proper size screen could separate the two materials.

Moreover, Defendants argue that the railroads are fully capable of dealing properly with track that has adjacent walkways because, based on the verified statements of Plaintiffs' experts, Mr. Bredenberg and Mr. Miller, the railroads currently maintain many miles of track with walkways.

Consistent with Dr. Hudson's opinion, Mr. Haggard, a federally certified railroad safety inspector, states in his affidavit that "nothing in the [FRA's] Track Safety Standards is concerned with or addresses walkways, excessive dropoffs next to roadbeds, the prevention of slippery surfaces, uneven surfaces, or foreign objects on surfaces near tracks, or any other footing problems for railroad workers, which is the subject matter addressed in 16 T.A.C. § 5.619."

Mr. Haggard also claims that walkways are not part of the roadbed, which is that area of soil under the railway that structurally supports the track.[7] He states that walkways are merely areas that parallel the roadbed and provide railroad employees a safe place to perform their duties. He also claims that roadbeds would not have to be widened or extended to support the walkway because "walkway fill" could be used to support the walkway. He further adds that walkway material would not interfere with adequate drainage because it would not be located in the cribs between the ties, as the ballast material is, and would not perform the same function as ballast. In sum, Mr. Haggard concludes that the federal regulations apply only to the structure which bears the loads created by train

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[7] Mr. Haggard relies on a definition of "roadbed" taken from the American Railway Engineering Association Manual for Railway Engineers. The Manual states: "The roadbed consists of that zone of soil or rock which supports loads from the track structure and is subject to weathering and deterioration from traffic loads." Volume I, page 1-1-30.

traffic, and that the existence of the walkways would not affect the load bearing portion of the track, or the drainage capacity of the ballast.

(C) Findings of Fact

The experts on both sides present the Court with persuasive arguments. The Court finds more persuasive the testimony and evidence presented by Plaintiffs' experts. The Plaintiffs have adequately demonstrated, through the opinion letter of the Chief Counsel of the FRA, through policy statements of the FRA, and through the practical involvement of the FRA in inspecting the areas adjacent to the roadbed, that it is both the policy and practice of the FRA to govern safety standards in the area immediately adjacent to the roadbed, including the area encompassing the walkway.

Moreover, from the exhibits and testimony presented to the Court by Plaintiffs, the Court is of the opinion that the roadbed would, in fact, have to be enlarged laterally and strengthened in order to support the walkway. Mr. Haggard's opinion on this issue is that the roadbed would not have to be extended because fill material could be used to support the walkway. Nevertheless, it has become clear to the Court, from all the evidence before it, that whether the extension of the roadbed is called "fill" material or "roadbed" material, the body of material used to support the walkway would have to adjoin the roadbed in such a way that it would be integrated with it and, in essence, merely become an extension of it.

Accordingly, the Court finds that the evidence and reports submitted by Plaintiffs' experts on the issue of the extent to which the walkway and extended roadbed would be integrated with the existing roadbed and track structure are more credible than the evidence and reports submitted by Defendants experts on this issue. The Court rejects the

argument that the walkway requirement is a rule with independent application from the federal regulations and that compliance with the walkway rule would have no impact on compliance with the federal regulations. It is a specious argument to say simply that section 5.619 merely requires a walkway and that it is up to the railroads to comply by whatever means or cost necessary.

Several other courts have found that walkway areas are necessarily a part of the track roadbeds and have held that state regulations covering these areas are preempted by 49 C.F.R. 213. *See, e.g., Norfolk and Western Railway Co. v. Burns*, 587 F.Supp. 161, 170 (E.D. Mich. 1984); *Black v. Baltimore and Ohio Railroad Co.*, 398 N.E.2d 1361 (Ind. Ct. App. 1980); *Black v. Seaboard Systems Railroad*, 487 N.E.2d 468 (Ind. Ct. App. 1986).

In sum, the Court finds:

(1) A railroad track structure consists of rails, ties, ballast materials and roadbed;

(2) Federal regulations comprehensively cover the subject matter of rails, ties, ballast materials, roadbed and areas immediately adjacent thereto, and track structure drainage capability;

(3) 16 T.A.C. § 5.619 specifically requires construction of walkways adjacent to the roadbed, extending six feet from end of tie;

(4) The width, surface and slope requirements of section 5.619 would generally add to the FRA standards by requiring the railroads to strengthen or enlarge the roadbed beyond the FRA requirements;

(5) The width, surface and slope requirements of section 5.619 would require the extension of the roadbed

and construction of the walkway in a manner that is compatible with the existing roadbed and track structure, thus making them an integral part of the existing roadbed and track structure;

(6) Roadbed maintenance practices necessarily involve the use of heavy machinery which would mix the top layer of ballast rock with subballast materials with the result that crushed rock used for walkways would be mixed with other ballast material during ordinary roadbed maintenance;

(7) Walkways constructed by the specifications of section 5.619 would require materials that would, because of continuous rail traffic and regular maintenance, have the effect of weakening the track structure, impair drainage, and in time, weaken the roadbed itself; and

(8) The Federal Railroad Administration has regulated walkway conditions in Texas in at least two instances by investigating and citing improper walkway conditions in Southern Pacific Transportation Company and The Atchison, Topeka and Santa Fe Railway Company Texas yards.

D. Conclusions of Law

The Court makes the following conclusions of law. Plaintiffs have adequately demonstrated through all the evidence presented, through the opinion letter of the Chief Counsel of the FRA, through the policy statements of the FRA, through 49 C.F.R. 213, and through the practical involvement of the FRA in the inspection and maintenance of the area adjacent to the roadbed, that the FRA has acted to completely occupy the field of railway safety specifically related to the roadbed, track structure, and walkways.

As a result, the Court finds that federal regulations cover the subject matter of 16 T.A.C. § 5.619. Section 5.619 of the Texas Administrative Code is, therefore, preempted by total federal occupation of the subject matter.

III. PLAINTIFFS' SECOND CAUSE OF ACTION

In their second cause of action, the railroads assert that 16 T.A.C. § 5.619 is preempted for failure to address local safety hazards and for incompatibility with an existing federal law, rule, regulation, order or standard. Having found that section 5.619 is preempted by federal occupation of the subject matter, the Court will now address the second cause of action in the alternative. As stated, if federal regulations do not wholly occupy the subject matter, a State may adopt an additional or more stringent law, rule, regulation, order or standard covering the same subject matter only: (1) when necessary to eliminate or reduce an essentially local safety hazard; (2) when not incompatible with any federal law, rule, regulation, order or standard; and (3) when not creating an undue burden on interstate commerce. *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

Whether a hazard is local or statewide is a question that was addressed by the House Report on the Railroad Safety Act of 1970, which states in pertinent part:

> The States will retain authority to regulate individual local problems or reduce essentially local railroad safety hazards. Since these local hazards would not be Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering same subject matter.

H.R. REP. NO. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. AND AD. NEWS 4104, 4117.

The House Report indicates that safety hazards that are of statewide character were not meant to be included in the definition of purely "local" safety hazards. Several courts have also found that the "essentially local safety hazards" prong does not include the imposition of statewide standards. *See, e.g., National Association of Regulatory Utilities Commissioners v. Coleman*, 542 F.2d 11, 14-15 (3d Cir. 1976); *Consolidated Rail Corp. v. Pennsylvania Public Utilities Commission*, 536 F.Supp. 653, 658 (E.D. Pa.), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983); *Atchison, Topeka and Santa Fe Railway v. Illinois Commerce Commission*, 453 F.Supp. 920, 926 (N.D. Ill. 1977).

Based on the Railroad Commission's admission in response to Plaintiffs' request for admission, section 5.619 admittedly has statewide application. The rule addresses rail safety matters, the condition and composition of railroad track structures, which have in the very least, have been addressed by a federal law, rule, regulation, order or standard. Accordingly, the Court makes the following findings of fact.

A. Findings of Fact

The Court finds that:

(1) 16 T.A.C. 5.619 is not a regulation that is necessary to eliminate or reduce an essentially local safety hazard;

(2) Based on the Court's findings related to the Plaintiffs' first cause of action, section 5.619 is not compatible with the FRA and its attendant regulations, which address the subject matter of 5.619, as it imposes additional and more stringent requirements on the track structure; more and different ballast materials; an enlargement and extension of the roadbed and ballast

sections; and would impede the drainage capability of the track structure.

B. Conclusions of Law

The Court finds that section 5.619 has failed the three part test of 49 U.S.C. § 434, in that it does not apply to an essentially local safety hazard, and in that it is incompatible with federal regulations addressing the subject matter of the rule. Accordingly, section 5.619 is preempted by a federal law, rule, regulation, order or standard, specifically, the FRSA and its attendant regulations, 49 C.F.R. 213.

IV. PLAINTIFFS' THIRD AND FOURTH CAUSES OF ACTION

The Fifth Circuit, on appeal, stated that, [i]f the district court determines that the state walkway regulation is not preempted under the foregoing standard, it must then consider the railroads' remaining arguments concerning the walkway regulation not addressed in its original opinion." 833 F.2d at 576. Having found that section 5.619 is preempted on two alternative grounds, the Court finds it unnecessary to address Plaintiffs remaining causes of action. The Court finds that the remaining causes of action are moot and HEREBY DISMISSES causes of action three, four, and five.

ACCORDINGLY, IT IS ORDERED that 16 T.A.C. § 5.619 is preempted by federal regulatory occupation of the subject matter, and for failing the three part test contained in 49 U.S.C. § 434.

IT IS FURTHER ORDERED that the Defendant Railroad Commission of Texas, its agents, servants, employees and attorneys are PERMANENTLY ENJOINED from enforcing 16 T.A.C. § 5.619.

IT IS FURTHER ORDERED that all parties shall bear their own costs and attorney's fees related to this case.

SIGNED AND ENTERED this 5th day of September, 1990.

/s/ James R. Nowlin
UNITED STATES DISTRICT JUDGE

APPENDIX D

United States District Court
WESTERN DISTRICT OF TEXAS

MISSOURI PACIFIC RAILROAD CO, ET AL — **JUDGMENT IN A CIVIL CASE**

V.

RAILROAD COMMISSION OF TEXAS, ET AL — CASE NUMBER: A-86-CA-406

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that causes of action three, four and five are dismissed.

ORDERED that 16 T.A.C. Section 5.619 is preempted by federal regulatory occupation of the subject matter, and for failing the three part test contained in 49 U.S.C. Section 434.

IT IS FURTHER ORDERED that the Defendant Railroad Commission of Texas, its agents, servants, employees and attorneys are PERMANENTLY ENJOINED from enforcing 16 T.A.C. Section 5.619.

IT IS FURTHER ORDERED that all parties shall bear their own costs and attorney fees related to this case.

9/6/90 CHARLES W. VAGNER
Dated Clerk

/S/
(By) Deputy Clerk

APPENDIX E

MISSOURI PACIFIC RAILROAD COMPANY, et al.
Plaintiffs-Appellees,

v.

RAILROAD COMMISSION OF TEXAS, et al.,
Defendants-Appellants.

No. 87-1151.

United States Court of Appeals,
Fifth Circuit.

Dec. 10, 1987.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, POLITZ, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Several railroads sought declaratory and injunctive relief against the Railroad Commission of Texas ("State" or "Commission") alleging that certain railroad safety regulations recently promulgated by the Commission were preempted by regulations of the Federal Railroad Administration ("FRA"), enforcing the Federal Railroad

Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421 *et seq.*[8] The railroads alleged federal preemption and asserted *inter alia* that the Commission's regulations unduly burdened interstate commerce and deprived them of property without due process of law. The district court granted the railroads' motion for partial summary judgment, concluding that the State's safety equipment requirement, 16 T.A.C. 5.617, walkway requirement, 16 T.A.C. 5.619, and vegetation control provision, 16 T.A.C. 5.620(b), were each "specifically preempted by federal regulatory occupation of their subject matter." *Missouri Pacific R.R. Co. v. Railroad Comm'n of Texas*, 653 F.Supp. 617, 628 (W.D. Tex. 1987). Alternatively, the district court concluded that the statewide character of *each* of the challenged regulations, 16 T.A.C. 5.616-5.620, indicated a failure to respond to "essentially local safety hazards" as required by 45 U.S.C. § 434. *Id.* at

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[8]Specifically, the railroads challenged the Commission's adoption of Tex. R.R. Comm'n, 16 Tex.Admin.Code 5.616-5.620 (hereinafter cited as "16 T.A.C. ___"). The following are summaries of each provision:

i) 5.616 requires railroads to file with the Commission copies of certain monthly reports filed with the FRA pursuant to 49 C.F.R. 228.19, copies of programs for periodic conduct of operational tests and inspections filed with the FRA pursuant to 49 C.F.R. 217.9, copies of programs for periodic instruction of employees filed with the FRA pursuant to 49 C.F.R. 217.11, and codes of operating rules, time tables, and time table special instructions;

ii) 5.617 requires operable fire extinguishers and first aid kits on each caboose and locomotive;

iii) 5.618 requires railroads to file with the Commission updated wayside detector maps, charts, or lists;

iv) 5.619 requires smooth, maintained, properly sloped walkways which are level with the tops of the ties along both sides of all tracks within railyards and the tracks adjacent hereto, in an effort to provide safer working conditions for employees working on or around the tracks;

v) 5.620 prohibits visual obstructions, including railroad equipment, signs, billboards, and excess vegetation, at public grade crossings.

627-28. The Commission appeals. We affirm in part, reverse in part, and remand.

I.

The Supreme Court has delineated certain principles by which we determine the preemptive scope of federal legislation or regulations under the Supremacy Clause. We "start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). The first inquiry is "whether Congress explicitly or implicitly declared that the states are prohibited from regulating" precise areas to which state regulations apply. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978). However, "[e]ven if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a federal statute." *Id.* "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Finally, "'where failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such [state] regulation is appropriate or approved pursuant to the policy of the statute,' states are not permitted to use their police power to enact such a regulation." *Ray*, 435 U.S. at 179, 98 S.Ct. at 1004-05. Although on reflection these guides are easier to state than to apply, by their compass we shall try to set our course.

Section 434 of the FRSA provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

By its terms, § 434 mandates national railroad safety standards "to the extent practicable." State regulation may, however, be interposed (1) where no federal standard has yet been adopted "covering the subject matter" of the state regulation or (2) to eliminate or reduce "an essentially local safety hazard."[9]

Legislative history does not enlighten our interpretation of how or what FRA regulations "cover the subject matter" of rail safety to the exclusion of continued state efforts.[10] Because the Act specifically preserves a

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[9]On appeal, the Commission does not seek to justify the challenged regulations under the second alternative, and we shall therefore not discuss it.

[10]Congress recognized that enactment of the FRSA would not instantaneously cover every safety hazard. *See* H.R.Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.CODE CONG. & AD.NEWS

regulatory position for the states, we are reluctant to jump to the conclusion that the Act evinced a "total preemptive intent." Compare *National Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir.1976). Instead, we will attempt pragmatically to reconcile the scope of FRA regulations with the state regulations by considering whether in light of Congressional policy and FRA actions, a national rule, regulation, order or standard has been adopted "covering the subject matter" of the state regulations.

II.

A.

The Commission's walkway requirement poses the most difficult preemption issue. Section 5.619 defines a walkway as "a pathway located alongside a railroad track or railroad switch for the purpose of providing an area for a railroad employee to perform duties associated with that track." The required walkways are intended to provide a surface to support railroad employees working alongside railroad rolling equipment and track. The regulation establishes walkway surface, slope, and width specifications and requires walkways to be constructed along both sides of all tracks within rail yards.

Literally and figuratively, the walkways required by state regulations sit atop and adjoin the roadbed for which FRA has prescribed minimum specifications. The federal regulation governs roadbed, track geometry and track structure and specifically covers areas "adjacent to the

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4104, 4109 [hereinafter cited as House Report]. Therefore, as the House Report indicates, "existing state requirements [would] remain in effect until preempted by federal action[,]" *id.* at 4108, and "[o]nce the [FRA] has prescribed a uniform national standard, the State would no longer have authority to establish statewide standards with respect to rail safety." *Id.* at 4116-17.

roadbed" as well as track gauge, alignment, surface, ballast, drainage and component parts. 49 C.F.R. 213.31-213.143 (1986).

The Commission supports its regulation with a concededly appealing argument that FRA has not "covered the subject matter" of walkways because federal regulations do not mandate walkways. As the FRSA focuses on safety, whether or not a particular state regulation "covers the subject matter" of a federal regulation should be analyzed, according to the Commission, in terms of its precise safety concerns. This argument has found favor with several courts.[11] We reject this analysis as overly simplistic.

We have already observed that the Supreme Court in *Florida Lime & Avocado Growers, supra*, refused to resolve preemption issues by merely comparing the objectives of the federal and state regulations. If the purpose of the state regulation was alone controlling, a state could enact a walkway requirement or other safety regulation that hindered or prevented a railroad from complying simultaneously with an FRA regulation designed to enhance safety in a different area. Federal superintendence of the field would be thwarted by such a mincing construction of whether FRA regulations "cover the subject matter."

Further, the scope of preemption under § 434 is informed by its introductory language directing the

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[11] *See, e.g., Southern Pacific Transp. Co. v. Public Util. Comm'n of California*, 647 F.Supp. 1220 (N.D. Cal. 1986), *aff'd*, 820 F.2d 1111 (9th Cir. 1987) (*per curiam*); *Illinois Central Gulf R.R. Co. v. Tennessee Pub. Serv. Comm'n* 736 S.W.2d 112 (Tenn.Ct.App.) (permission to appeal denied August 31, 1987). *But Compare Norfolk & Western Ry. Co. v. Burns*, 587 F.Supp. 161 (E.D.Mich. 1984); *Black v. Seaboard System R.R.*, 487 N.E. 2d 468 (Ind.Ct.App. 1986); *Black v. B & O Ry. Co.*, 398 N.E.2d 1361 (Ind.Ct.App. 1980).

establishment of national rail safety standards "to the extent practicable." It would be impracticable and inconsistent with this intent, if, assuming walkways are integrally related to track structure and composition, 50 states could establish individual walkway regulations in addition to the FRA standards.

Consequently, "covering the subject matter" must have a practical as well as a policy dimension under the FRSA. It must be "practicable" to permit some state regulation of railroad walkways consistent with FRA track structure and construction requirements. In drawing this conclusion, we find instructive the Supreme Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978). There, the Court invalidated a Washington state regulation that purported to set minimum safety standards for oil tankers intending to traverse Puget Sound. The Court held that the Federal Tank Vessel Act and its regulatory implementation preempted "state efforts to mandate different or higher design requirements" for oil tankers. *Id.* at 166, 98 S.Ct. at 998 (foot-note omitted). The Court's interpretation of the applicable federal laws led it to conclude that "Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulation ... would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard." *Id.* at 163-64, 98 S.Ct. at 997. The Court distinguished cases in which it had upheld state regulations that affected federally registered vessels, where there was no overlap between federal law and state regulations having a different and non-conflicting purpose and implementation. *See, e.g., Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960).

It likewise appears in this case that the Commission may seek to enforce "different or higher standards" of track construction by superimposing the walkway requirement on

federal track geometry and structure regulations. This would be the case if, from a practical standpoint, the width, surface and slope requirements of the state walkway regulation generally add to the FRA standards by requiring the railroad to strengthen or enlarge the roadbed beyond FRA requirements.[12] If the walkway regulation has this effect, we hold that the federal regulation has "covered the subject matter" of track composition and design and that the state regulation conflicts with § 434's purpose to foster national rail safety standards "to the extent practicable."

Unlike the district court, however, we are unable to determine from the summary judgment record whether such an overlap exists. The affidavit of Michael McGinley, a railroad engineer, submitted on behalf of the railroads, implies that design, construction and maintenance standards for walkways and railroad track and roadbed are as inseparable as peanut butter from a slice of bread. The Commission, however, submitted a controverting affidavit. The district court perfunctorily dismissed the controverting affidavit, notwithstanding that the Commission's witness purported to contradict McGinley on virtually every salient point he made. We believe there is a material fact issue concerning the interrelationship between the state walkway requirement and federal track regulations. The trial court should not have determined between these experts' conflicting views on affidavits alone. *Anderson v. Liberty*

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[12]The distinction we seek to draw between a functionally overlapping state regulation and one not "covered by the subject matter" of an FRA regulation may be illustrated hypothetically. If the Commission sought to regulate walkway safety by requiring railroads to post signs wherever the walkways were slippery or obstructed, we would not find this preempted. Not only does this hypothetical regulation address a hazard not specifically covered by FRA regulations, *see* discussion *infra*, but its implementation in no way adds to the FRA's basic track construction regulations or impairs FRA's superintendence of that field.

Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). We therefore REMAND this issue for trial.

In so doing, we also reject the railroads' contention that the FRA, by declining to promulgate various walkway regulations in the past, has specifically intended to "cover the subject matter" of walkways so as to preempt state regulations. Here the railroads must rely on the principle stated in *Ray* that, "where failure of ... federal officials affirmatively to exercise their full authority *takes on the character of a ruling that no such regulation is appropriate* or approved pursuant to the policy of the statute, states are not permitted to use their police power to enact such regulation." 435 U.S. at 178, 98 S.Ct. at 1004 (quoting *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 774, 67 S.Ct. 1026, 1030, 91 L.Ed. 1234 (1947)) (emphasis added). *See also Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983).

We agree with the district court in *Southern Pacific Trans. Co. v. Public Util. Comm'n of California*, 647 F.Supp. 1220 (N.D.Cal.1986), which found no explicit or implied preemptive expression by FRA in its previous walkway ventures. *Southern Pacific* summarizes two of the agency actions succinctly.

> When the FRA decided not to adopt proposed regulation 213.39 relating to obstacles near tracks, it did not do so because it concluded that the regulation was not justified. Rather, the agency decided that the regulation was too vague to be effective. 36 Fed.Reg. 20, 336 (1971). When the FRA decided not to adopt a regulation requiring walkways on trestles and bridges, its reasons related specifically to conditions affecting those structures. 42 Fed.Reg. 22,185 (1977). It did not conclude that a general requirement of walkways was not justified.

647 F.Supp. at 1226. Finally, FRA's 1978 Policy Statement delineating the respective responsibilities of FRA and OSHA over railroad safety matters, while asserting that OSHA should not regulate "walkways beside the track in yards or along the right-of-way," nevertheless stated that "FRA *will determine* the need for and feasibility of general standards related to such surfaces." 43 Fed.Reg. 10,582, 10,587 (1978) (emphasis added).[13] This statement in no way suggests that the FRA has decided as a matter of policy that walkway regulations must be national in character and must preempt state action. The policymaker appears to be saying that "we haven't looked at walkways yet," rather than, as *Ray* requires, "we haven't done anything because we have determined it is appropriate to do nothing." From this standpoint, the FRA's statement implies that unless walkway regulations are otherwise preempted, e.g., by FRA track and roadbed regulations that "cover the subject matter," § 434 could authorize state regulation until the FRA acts.

If the district court determines that the state walkway regulation is not preempted under the foregoing standard, it must then consider the railroads' remaining arguments concerning the walkway regulation not addressed in its original opinion.

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[13]Our court's reliance in *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216, 218 (5th Cir. 1984), on the FRA Policy Statement does not bear on this case. The sole issue in *Velasquez* was whether OSHA or FRA regulations applied to a walkway beside a track, for purposes of a personal injury action jury instruction. To hold, as *Velasquez* did, that the FRA Policy Statement prevented plaintiff from securing an instruction on OSHA regulations, does not control the issue of the exercise of FRA jurisdiction to the exclusion of state regulation under § 434.

B.

But for one facet of its ruling, the district court properly concluded that the Locomotive Boiler Inspection Act of 1911, 45 U.S.C. § 22 *et seq.*, wholly occupies the field of regulation of locomotive equipment to the exclusion of 16 T.A.C. 5.617. *See Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613, 47 S.Ct. 207, 210, 71 L.Ed. 432 (1926); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F.Supp. 653, 655 (E.D. Pa.), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912, 103 S.Ct. 1888, 77 L.Ed. 280 (1983). In *Napier* the Supreme Court stated:

> We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of authority conferred upon the Commission leads to that conclusion. Because the standards set by the Commission must prevail, requirements by the states are precluded, however comendable or however different their purpose.

272 U.S. at 613, 47 S.Ct. at 210 (citations omitted). The district court apparently overlooked, however, 16 T.A.C. 5.617's requirement that fire extinguishers and first aid kits be placed not only on locomotives but on cabooses as well. Cabooses are not within the purview of the Locomotive Boiler Inspection Act, and we find no reason to hold 5.617 preempted to the extent of its application to cabooses. Moreover, the Commission's severability clause applicable to these regulations, 16 T.A.C. 5.621, permits enforcement of 5.617 only in regard to cabooses. We thus affirm the validity of 5.617 as applied to cabooses as a proper exercise of the state's police power.[14]

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[14]Contrary to the Commission's assertion, *Southern Ry. Co. v. Lundsford*, 297 U.S. 398, 56 S.Ct. 504, 80 L.Ed. 740 (1936), does not stand for the proposition that under the Locomotive Boiler Inspection

C.

Turning to 16 T.A.C. 5.620, we reject the district court's finding that federal regulations preempt the state vegetation control provision. The FRA regulations provide for vegetation control provide:

> Vegetation on railroad property which is *on or immediately adjacent to roadbed* must be controlled so that it does not--
> (a) Become a fire hazard to track-carrying structures;
> (b) Obstruct visibility of railroad signs and signals;
> (c) Interfere with railroad employees performing normal trackside duties;
> (d) Prevent proper functioning of signal and communication lines; or
> (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

Act state attempts to regulate are preempted only to the extent they prescribe "integral or essential" equipment of a complete locomotive. *Lundsford* held that "mere experimental devices which do not increase the peril, but may prove helpful in an emergency" are not "parts or appurtenances" whose lack of maintenance will subject the railroad to absolute tort liability under 45 U.S.C. § 23. 297 U.S. at 402, 56 S.Ct. at 506. State attempts to prescribe *any* locomotive safety equipment must necessarily fail. *Accord, Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) ("*Lundsford* in no way affects our holding that the Boiler Inspection Act preempts any state regulation of locomotive equipment.") Moreover, state court cases upon which appellant relies as establishing a contrary proposition, *see Norfolk & W. Ry. Co. v. Pennsylvania Pub. Util. Comm'n*, 489 Pa. 109, 121, 413 A.2d 1037, 1043 (1980); *State v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 79 Wash.2d 288, 292-94, 484 P.2d 1146, 1149, *appeal dismissed*, 404 U.S. 804, 92 S.Ct. 108, 30 L.Ed. 36 (1971), are unpersuasive and contrary to federal policy.

49 C.F.R. 213.37 (1986) (emphasis added). The state, in an effort to prevent visual obstruction to vehicular highway traffic promulgated 16 T.A.C. 5.620(b), which provides:

> Each railroad corporation shall control vegetation on its right-of-way (except for the roadbed in areas immediately adjacent thereto) for a distance of 500 feet each way from every public grade crossing so that it does not obscure the view of approaching trains to vehicular road traffic.

The district court held that the entire right-of-way is an "area immediately adjacent to the roadbed" and on this basis concluded that 16 T.A.C. 5.620(b) "covered the same subject matter" for purposes of 45 U.S.C. § 434. 653 F.Supp. at 626. We disagree. The area "immediately adjacent to the roadbed" abuts the roadbed. Right-of-way property can and often does extend several yards from the roadbed, however. Consequently, not all right-of-way property lies "immediately adjacent to the roadbed," and the federal regulation does not "cover the subject matter" of vegetation that is on the right-of-way but not immediately next to the roadbed.

Additionally, there is no pragmatic overlap of the federal and state regulations such as we found with respect to walkway regulations. The state regulation was designed to apply where the federal requirements end. The Commission's preamble affirms that 5.620(b) "specifically excludes applicability to vegetation on the roadbed and immediately adjacent thereto. ...[T]he commission's section takes effect where the federal rule leaves off. The commission believes that compliance with both rules will ensure a clear line-of-sight adequate to protect vehicle occupants." 11 Tex.Reg. 2741 (June 13, 1986). The Commission drafted its requirement in response to a demonstrable safety need reflected in a 1985 study conducted by the National Transportation Safety Board.

The study indicated that in recent train collisions with motor vehicles, obstructions, particularly vegetation obstructions, limited the drivers' views along the railroad. There are no federal standards for minimum sight distance at grade crossings, nor does enforcement of 5.620(b) impair or interfere with FRA regulation 213.37. Consequently, because 5.620(b) does not govern vegetation control on the roadbed and area immediately adjacent thereto, we hold that the state vegetation control requirement is not preempted by § 434 or FRA regulation.

D.

In its alternative holding that each of the challenged regulations failed to address an "essentially local safety hazard", the district court implicitly invalidated the reporting requirements of 16 T.A.C. 5.616 and 5.618. The court apparently believed obligations "covering the same subject matter" had already been enacted by FRA. We reject this conclusion.

The FRSA provides that when a state agency satisfies the statutory certification process, "[a] state may participate in carrying out investigative and surveillance activities in connection with any rule, regulation, order, or standard prescribed by the Secretary...." 45 U.S.C. § 435(a). The House Report on the bill recognized and explicitly preserved the state's participation in enforcement of the federal scheme as a vital element in administration of the Act. House Report at 4109. Indeed, the FRA's regulations indicate that states provide an "enhanced investigative and surveillance capability," 49 C.F.R. 212.101 (1986), and contemplate a coordinated investigative and surveillance effort between the states and FRA. 49 C.F.R. 212.101 (1986).

Consistent with this enforcement scheme, the Commission adopted certain regulations enabling it to

contribute optimally, by requiring simultaneous filing with the Commission of documents required by the FRA. Such reporting regulations do not offend the Act. *See Coleman*, 542 F.2d at 15. Moreover, we do not find the Commission's additional reporting requirements proscribed under the Act. In *Coleman*, the Third Circuit approved contemporaneous filing of copies of FRA-mandated reports with the state, but it also held that the FRA regulation there specifically preempted states from prescribing additional "accident/incident" reporting requirements. *See* 49 C.F.R. 225.1. Here, by contrast, the Commission regulations do not require the railroads to create any additional reports. The Commission only requires the filing of documents such as maps and charts already maintained by the companies. *See* note 1 *supra*. Given the overall surveillance scheme contemplated by the FRSA, federal proscription of the Commission's reporting requirements in 16 T.A.C. 5.616 and 5.618 is not warranted.

III.

We summarize our holding as follows: We reverse the district court's conclusion that the Commission's walkway requirement, 16 T.A.C. 5.619, is preempted by federal regulation covering the "same subject matter," and we remand this issue for further proceedings. We affirm the district court's conclusion that the Commission's attempt to regulate safety equipment on locomotives is preempted by the Locomotive Boiler Inspection Act of 1911; however, we reverse the district court's conclusion that the requirements of 16 T.A.C. 5.617 concerning safety equipment on railroad cabooses is preempted. Third, we reverse the conclusion that the vegetation control provision, 16 T.A.C. 5.620(b), is preempted. Fourth, we reject the court's implicit holding that the filing requirements of 16 T.A.C. 5.616 and 5.618 are preempted.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX F

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,

Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF
the STATE OF CALIFORNIA, et al.,

Defendants.

No. C-86-2480-WWS.

United States District Court,
N.D. California.

Nov. 3, 1986.

MEMORANDUM OF OPINION AND ORDER

SCHWARZER, District Judge.

This is an action brought by Southern Pacific Transportation Company ("Southern Pacific") for declaratory and injunctive relief against General Orders Nos. 26-D and 118 issued by defendant Public Utilities Commission of the State of California ("CPUC"). Southern Pacific contends that the orders are preempted by the Federal Railroad Safety Act ("FRSA") and constitute an unreasonable burden on interstate commerce. CPUC has moved for summary judgment.

STATEMENT OF FACTS

In 1948, CPUC adopted General Order No. 26-D. This order prescribes the minimum distances (clearances) railroads must maintain between freight cars and structures located above and beside railroad tracks and between parallel tracks. The part of the order challenged here provides that, with certain exceptions, "[t]he minimum distance between center lines of parallel standard gauge tracks shall be fourteen (14) feet." The order applies to tracks constructed or reconstructed after its effective date.

General Order No. 118 was adopted in 1963. That order requires railroads to maintain a two-foot wide continuous walkway on each side of their tracks. The order provides that "walkways shall provide a reasonable, regular surface with gradual slope not to exceed one inch to eight inches."

The purpose of both rules is to provide railroad employees with a safe working environment. General Order No. 26-D is designed to afford employees the minimum workspace necessary to avoid being crushed between trains moving on parallel tracks. General Order No. 118 is designed to provide employees with safe footing while working beside tracks.

Southern Pacific contends that the General Orders impose extraordinary costs and achieve only minimal safety benefits. Employees of Southern Pacific have submitted declarations stating that the company has experienced severe financial difficulties in recent years and that, as a result, the company lacks adequate maintenance funds. One employee states that the General Orders force Southern Pacific to divert scarce financial resources from important maintenance projects in other states to work in California which will result in little, if any, safety benefit to employees.

In addition, Southern Pacific challenges a specific decision of the CPUC finding that the company's Fresno switching yard has undergone reconstruction and ordering Southern Pacific to bring the yard into compliance with General Order No. 26-D. Because Southern Pacific cannot afford the $4,000,000 it would allegedly need to spend in order to bring the yard into compliance, it has ceased operations on thirteen tracks in the yard. According to Southern Pacific's General manager for the Southern Region, this shut-down has resulted in delays of one day in some of the traffic which previously went through the yard.

CPUC has introduced substantial evidence that the General Orders provide a safer working environment for railroad employees. CPUC's Assistant Transportation Supervisor has submitted a declaration which explains in detail why the orders provide the minimum space necessary for employees to perform their job functions safely. He describes fatal accidents that probably would have been avoided if tracks had complied with General Order No. 26-D's clearance requirements. And he cites statistics which demonstrate that poor footing near tracks is a major source of accidents. Moreover, CPUC has submitted evidence that tends to contradict Southern Pacific's contentions that its financial situation is precarious and that the Fresno Yard decision causes delays.

In 1970, Congress adopted the FRSA, Pub.L. No. 91-458, 84 STAT.971 (1970) (codified as amended at 45 U.S.C.A. §§ 421-444 (West 1972 & Supp. 1986)). The purpose of the FRSA is "to promote safety in all areas of railroad operations." 45 U.S.C.A. § 421 (West 1972). In order to accomplish that purpose, the act authorizes the Secretary of Transportation "to prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." *Id.* § 431. The Secretary of Transportation has delegated that responsibility to the

Federal Railroad Administration ("FRA"). 49 C.F.R. § 1.49(m)(1985).

The FRSA declares that railroad safety regulations "shall be nationally uniform to the extent practicable." 45 U.S.C.A. § 434 (West 1972). The act, however, allows state regulation of railroad safety in certain circumstances:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Id.

Pursuant to its delegated authority, the FRA has adopted a set of "Track Safety Standards." 49 C.F.R. §§ 213.1-.241 (1985). These standards set forth requirements for track geometry, structure, and inspections. *Id.* They also establish two requirements for the roadbed supporting railroad tracks. Roadbeds must have adequate drainage, and vegetation on or near roadbeds must be controlled so that it does not obstruct visibility or interfere with railroad employees performing their duties. *Id.* § 213.37.

Between 1971 and 1978, the FRA pursued three rule making proceedings relating to safety concerns addressed by General Orders Nos. 26-D and 118. In its initial Notice of

Proposed Rule Making (NPRM), the FRA proposed to adopt § 213.39 as part of its track safety standards. The proposed section provided: "If an object or hazardous condition within 10 feet of the center line of track impedes the safe passage of equipment or prevents railroad employees from safely performing their duties, the owner of the track shall remove the object or correct the hazardous condition or give appropriate warning notification." 36 Fed.Reg 11,974, 11,976 (1971). After receiving comments on the NPRM, the FRA concluded that § 213.39 should not be adopted, "because its language was ... too vague to constitute an effective safety standard." 36 Fed.Reg. 20,336, 20,336 (1971).

In 1976, the FRA published an advance NPRM asking for comments on the question whether the agency should adopt regulations requiring walkways on trestles and bridges. 41 Fed.Reg. 50,302 (1976). In 1977 the FRA decided that it would not adopt such a regulation. 42 Fed.Reg. 22,184 (1977). The agency determined that the benefits of a nationwide requirement of walkways on those structures would be outweighed by the costs of the regulation. *Id.* at 22,185. The agency stated that "if an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a state agency that is in a better position to assess local need is the more appropriate response." *Id.*

Finally, a 1975 advance NPRM announced the FRA's intention to adopt railroad occupational safety and health standards. 40 Fed.Reg. 10,693 (1975). It was contemplated that the standards would include regulations covering "track, roadbed, track appliances, and related devices." *Id.* After receiving comments, the FRA announced that it would adopt a comprehensive code of occupational safety and health regulations by issuing a series of NPRMs covering discreet subjects. 41 Fed.Reg. 29,153 (1976). The first NPRM in the series proposed

regulations dealing with fire prevention, environmental controls, and means of egress to buildings used by railroad employees. *Id.*

In 1978, the FRA issued a "Policy Statement," which terminated this rule making proceeding and attempted to define "the relationship between the respective jurisdictions of the FRA and" the Occupational Safety and Health Administration of the Department of Labor (OSHA). 43 Fed.Reg. 10,583, 10,584 (1978). The FRA determined that a comprehensive code of occupational safety and health regulations directed specifically at railroads would unnecessarily intrude into areas adequately regulated by OSHA. *Id.* at 10,585, 10,587. At the same time, the FRA concluded that the safety of "railroad operations," which it defined as "the movement of equipment over the rails," should be "the responsibility of a single agency." The statement therefore set forth areas of railroad operations to which OSHA regulations should not apply. The FRA specifically determined that OSHA regulations on walking and working surfaces should not apply to "walkways beside the tracks in yards or along the right-of-way." *Id.* at 10,587. The Policy Statement indicated that the "FRA will determine the need for and feasibility of general standards related to such surfaces, keeping in mind the requirement of proper clearances." *Id.*

DISCUSSION

A. *Preemption*

The FRSA permits state regulation of railroad safety in two circumstances. First, State regulation is permitted as long as there is no federal rule, regulation, standard, or order covering the same subject matter. 45 U.S.C.A. § 434 (West 1972). Second, state regulation which does cover the same subject matter as federal regulation is permitted as long as it (1) is necessary to eliminate an essentially local

safety hazard, (2) is not incompatible with federal regulations, and (3) does not create an undue burden on interstate commerce. *Id.* The CPUC acknowledges that the General Orders are statewide regulations which do not address an "essentially local safety hazard." The sole question with regard to preemption is therefore whether federal regulations or standards cover the same subject matter.

Southern Pacific advances three arguments in support of its contention that the General Orders are preempted. Its first argument is that the FRA's existing track safety regulations cover the same subject matter as the General Orders. None of the FRA standards, however, addresses the subject of track clearance covered by General Order No. 26-D. The FRA track safety regulations set forth requirements for individual tracks. They cover, for example, the subject of rail gage, which is the distance between rails in a track. 49 C.F.R. § 213.53(1985). But they do not establish requirements for the distance between tracks.

Southern Pacific's contention that existing federal regulations preempt the CPUC's walkway requirements is somewhat more persuasive, but also ultimately unavailing. Southern Pacific has submitted evidence that the requirement of a two-foot wide continuous walkway requires extension of the ballast or subgrade. The ballast and subgrade are a track's supporting structure. Federal regulations set forth requirements for that structure. The FRA regulation on ballast require that it:

> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads

> imposed by railroad rolling equipment and thermal stress exerted by the rails;
> (c) Provide adequate drainage for the track; and
> (d) Maintain proper track cross-level, surface and alignment.

49 C.F.R. § 213.103(1985). General Order No. 118 thus affects an area of railroad operations covered by federal regulations. Southern Pacific argues that the order is preempted, reasoning that if state and federal regulations affect the same area of railroad operations, then they cover the same subject matter under § 434. But the legislative history of the FRSA indicates that Congress's primary purpose in enacting that statute was "to promote safety in all areas of railroad operations." H.R.Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.Code Cong. & Ad.News 4104 [cited as House Report]; *see also* 45 U.S.C.A. § 421 (West 1972). Congress's concern extended to the safety of employees engaged in railroad operations. House Report at 4106. Read in the light of that history, § 434 manifests an intent to avoid gaps in safety regulations by allowing state regulation until federal standards are adopted. State and federal regulations therefore cannot be held to cover the same subject matter unless they address the same safety concerns.

FRA regulations and General Order No. 118 do not cover the same subject matter under this interpretation. The ballast regulations relied upon by SP are designed to insure that tracks have adequate support. The regulations dealing with vegetation on or near roadbeds are designed to insure that employees can perform necessary maintenance work. *See* 49 C.F.R. § 213.37 (1985). No FRA regulation addresses the concern that employees have a safe working environment near railroad tracks.

The conclusion that existing FRA regulations do not cover the same subject matter as the General Orders is consistent with circuit court opinions applying § 434 to other situations. In *National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11 (3d Cir.1976), the court held that a state requirement that railroads file monthly accident reports was preempted by an FRA regulation which also required monthly reports. The Court indicated, however, that the state could require railroads to provide immediate notification of accidents. *Id.* at 15. In *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855, 94 S.Ct. 157, 38 L.Ed.2d 105 (1973), the court held that a city had no jurisdiction to require correction of track conditions which had allegedly caused derailments. The FRA's track safety standards addressed precisely the safety concerns which were the subject of the city's actions. *Id.* at 1112.

Southern Pacific's second argument is that the FRA's rejection of safety standards addressing the subject of employee safety near railroad tracks preempts the General Orders. The general principle for which Southern Pacific argues is sound. Under the FRSA the rejection as well adoption of standards can preempt state regulation. In *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983), the Ninth Circuit held that the Boiler Inspection Act (BIA) preempted a state requirement that locomotives be equipped with strobe or oscillating lights. *Id.* at 1152-53. The court reasoned that the BIA occupied the field of locomotive equipment regulation and that the FRSA had not altered the BIA's preemptive effect. *Id.* With respect to the FRSA, the court stated that it "preempts only those state laws where the federal government has acted with respect to the same 'subject matter.'" *Id.* It went on to state:

> The reasons we have given thus far suffice to determine this aspect of the case, but we note actions recently taken by the Federal Railroad Administration (FRA). Over a five year period, the FRA studied the effectiveness of strobe and oscillating lights, and, at least at this point, it "has concluded that the information in the docket does not support the proposition that alerting lights are effective in reducing the incidents of grade-crossing accidents. Without that support, a Federal regulatory requirement that railroads equip their locomotives with an alerting light is not justified." 48 Fed.Reg. 20,257 (May 5, 1983). Under the statutory scheme we are here considering, where the FRA has rejected the requirement of strobe or oscillating lights, a state may not require them. "'[W]here failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. [151] at 178, 98 S.Ct. [988] at 1004 [55 L.Ed.2d 179] (1978) (quoting *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 774, 67 S.Ct. 1026, 1030, 91 L.Ed. 1234 (1947). The recent action of the FRA is support for the conclusion that the subject has been preempted by administrative action as of this date ....

Id. at 1153-54. The *Marshall* dictum thus indicates that if after due consideration the FRA determines that a particular regulation is not justified, that determination has the same preemptive effect as the adoption of a regulation.

None of the instances in which the FRA has rejected regulations relating to employees' trackside working environment meet this standard. When the FRA decided not to adopt proposed regulation 213.39 relating to obstacles near tracks, it did not do so because it concluded that the regulation was not justified. Rather, the agency decided that the regulation was too vague to be effective. 36 Fed.Reg. 20,336, 20,336 (1971). When the FRA decided not to adopt a regulation requiring walkways on trestles and bridges, its reasons related specifically to conditions affecting those structures. 42 Fed.Reg. 22,185 (1977). It did not conclude that a general requirement of walkways was not justified. Finally, in deciding not to adopt a comprehensive set of railroad occupational safety and health standards, the FRA came to no conclusion regarding the merits of clearance or walkway requirements. *See* 43 Fed.Reg. 10,583 (1978).

Southern Pacific's final argument in favor of preemption is that in the 1978 Policy Statement the FRA assumed jurisdiction over subjects covered by the General Orders. This argument is unpersuasive for several reasons. First, the Policy Statement attempted to delineate the respective jurisdictions of the FRA and OSHA. It did not purport to limit state jurisdiction. *See Burlington Northern Railroad Co. v. Nebraska*, 83-L-423, slip. op. at 5 (D.Neb. May 10, 1985), *rev'd on other grounds*, 802 F.2d 994 (8th Cir.1986). Second, the conclusion that the FRA's jurisdiction extended to walkways beside tracks, *see* 43 Fed.Reg. 10,583, 10,587 (1978), did not follow notice and comment rule making proceedings, as required by the statute, 45 U.S.C.A. § 431(b) (West 1972). Third, the Policy Statement indicated that the FRA would determine the need for walkway regulations in the future, 43 Fed.Reg. 10,583, 10,587 (1978); the FRA thus did not claim to have adopted regulations covering that subject. Finally, the Policy Statement does not mention clearances. Regardless

of its effect on walkway regulations, it therefore cannot be said to preempt clearance standards.

Southern Pacific relies on two decisions holding that the FRA has preempted state walkway regulations. *Norfolk Western Railway Co. v. Burns*, 587 F.Supp. 161 (E.D.Mich.1984) (bench opinion); *Black v. Seaboard System Railroad*, 487 N.E.2d 468 (Ind.Ct.App.1986). These decisions are distinguishable but in any event rest on the arguments that the Court has here found to be without merit. The same is true of letters from FRA's General Counsel, submitted by Southern Pacific, offering his opinion that General orders Nos. 26-D and 118 are preempted. For the reasons stated in this opinion, the Court declines to follow these authorities.

B. *Commerce Clause*

While the commerce clause may be a restriction on state power to legislate, it is a source of authority for Congressional action. *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213, 103 S.Ct. 1042, 1047, 75 L.Ed.2d 1 (1983). Thus, "[w]here state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause, even if it interferes with interstate commerce." *Id.*

To the extent General Orders Nos. 26-D and 118 are authorized by § 434, they are not subject to scrutiny under the commerce clause. Section 434 authorizes state regulation of railroad safety in two circumstances. First, a state regulation is authorized if it addresses a subject not covered by federal regulations. Second, a state regulation which is more stringent than federal standards is allowed if it addresses an essentially local safety concern and does not unduly burden interstate commerce. What is significant about the statutory scheme is that absence of burden on commerce is a specified condition to state authority to

regulate only with respect to regulations that are more stringent than federal rules. Congress chose not to place this condition in the provision authorizing state regulations that address subjects not covered by federal regulations. Since the present orders are authorized under that provision whether they impose a burden on commerce is irrelevant.

Even if validity of the General Orders were assessed without reference to § 434 the result would be the same. The standard applicable to state regulations affecting interstate commerce is set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970): "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *See also, Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Board*, 709 F.2d 1250 (9th Cir.1983), *cf. Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (striking down a state prohibition against the use of a 65-foot double trailers on Iowa highways, subject to certain exceptions).

Southern Pacific's argument that the General Orders violate the commerce clause under this standard fails for two reasons. First, Southern Pacific has not shown that the orders burden commerce. Demonstrating that state regulations impose substantial costs on interstate operations is not sufficient to establish a burden calling for balancing under *Pike. Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526, 79 S.Ct. 962, 966, 3 L.Ed.2d 1003 (1959); *Burlington Northern Railroad Co. v. Department of Public Service*, 763 F.2d 1106, 1114 (9th Cir.1985). Rather, a challenger to a state regulation must show that it "impedes substantially the free flow of commerce from state to state." *Burlington*, 763 F.2d at 1114. Southern Pacific has failed to do so.

Second, the CPUC has introduced substantial evidence that the General Orders provide a safer working environment for railroad employees. Southern Pacific has not raised a genuine issue of fact as to whether safety benefits result from the orders. Thus even if the orders were not authorized by Congress, there is no evidence from which it could be found that any burden the orders impose is clearly excessive in relation to the benefits they produce.

For the reasons stated, the motion of CPUC for summary judgment will be granted.

IT IS SO ORDERED.

APPENDIX G

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,

Plaintiff-Appellant,

Railway Labor Executives' Association,

Intervenor-Appellee,

v.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA; et al.,

Defendants-Appellees.

No. 86-2983

United States Court of Appeals,

Ninth Circuit

Argued and Submitted June 11, 1987.

Decided June 30, 1987.

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN, BEEZER and THOMPSON, Circuit Judges.

PER CURIAM:

We affirm the district court's grant of summary judgment in favor of the California Public Utilities Commission set forth in the district court's opinion in *Southern Pacific Transp. Co. v. Public Utilities Comm'n*, 647 F.Supp. 1220 (N.D. Cal. 1986). We note that the district court failed to recognize that the topic of railtrack clearances had been mentioned in an administrative statement issued by the Federal Railroad Administration in 1978. This oversight, however, does not detract from the soundness of the district court's reasoning nor its conclusion that California's track clearance and walkway regulations have not been preempted by federal rule, regulation, order or standard covering the same subject matter as these state requirements. 45 U.S.C. § 434. This conclusion of the district court is correct.

Because there has been no federal preemption of California's track clearance and walkway requirements, we do not reach the questions whether these requirements are necessary to eliminate or reduce an essentially local safety hazard, are not incompatible with any federal law, rule, regulation, order or standard, and do not create an undue burden on interstate commerce. *See id.*

AFFIRMED.

APPENDIX H

§5.619. WALKWAYS REQUIREMENTS

(a) Definitions. The following words or terms, when used in this section, shall have the following meanings.

(1) Walkway--A pathway located alongside a railroad track or railroad switch for the purpose of providing an area for a railroad employee to perform duties associated with that track.

(2) Main track--A track, other than an auxiliary track, extending through yards and between stations and upon which trains or engines are operated and movements are authorized by block signals, time table, or train order, or the use of which is governed by rules or special instructions.

(3) Siding--A track auxiliary to the main track for meeting or passing trains.

(4) Yard--A system of tracks used for making up trains, storing of cars, and other purposes. Such tracks may include, but are not limited to, rolling stock repair and classification tracks. Main tracks and sidings are excluded from the definition of yard switching tracks except at those locations where either the main track or the siding is used as an integral component of the system of tracks used for classification of railroad cars or for making up trains.

(5) Classification tracks--A system of tracks, joined by a lead or ladder track at one or both ends, used for the sorting and arranging of cars in order according to destination or according to the railroad's instructions.

(6) Lead or ladder track--A track on which is located a series of closely spaced turnouts providing access to a system of classification tracks.

(7) Switch--A track structure used to divert railroad rolling stock from one track to another.

(b) Surface of walkways.

(1) Walkways shall have a reasonably smooth surface and shall be maintained in a safe condition, clear of vegetation, debris, standing water, and other obstructions.

(2) Walkways shall be surfaced with crushed materials not to exceed 1 1/2 inches in size or with asphalt, concrete, secured planking, grating, or similar material.

(3) Walkways shall be constructed and maintained in such a manner that the elevation of their surfaces are approximately level with the tops of the ties, but not higher than the top of the rails.

(c) Slope of walkways.

(1) Walkways shall not have a slope in excess of one inch of elevation per each eight inches of horizontal length in any direction.

(2) Excess slope is permissible where the proximity of adjacent tracks so dictates so long as the slope between adjacent tracks is constant.

(3) Excess slope is permissible at locations where a vehicle or pedestrian-way intersects a walkway unless the commission, after investigation, determines that

safety requires the slope prescribed by subsection (d)(1) of this section.

(d) Width of walkways. Walkways shall be constructed to a minimum width of six feet, as measured from the outside end of the crossties.

(e) Where walkways shall be required. Walkways shall be located along both sides of all tracks within yards and tracks adjacent thereto so as to include all points contiguous to yards where railroad employees normally work on the ground. Walkways conforming to this standard shall be constructed and maintained throughout the area where mechanical inspections routinely occur.

(f) Effective dates for walkways construction.

(1) Except as approved by the commission, no railroad track which is subject to walkway requirements and constructed after the effective date of this section shall be placed in service until walkways have been provided that are in compliance with the applicable standard found in this section and notice thereof is given to the commission.

(2) For existing trackage which is subject to walkway requirements, walkways shall be constructed no later than one year after the effective date of this section and maintained thereafter.

(g) Exemptions to walkway requirements. Walkway requirements do not apply:

(1) during periods of new track construction, maintenance, repair, renewal, reconstruction, or alteration of a right-of-way or track, where obstruction or removal of a walkway is unavoidable, provided affected railroad personnel are given prior written notice, and

provided walkways are returned to standard upon completion of the work;

(2) during periods of heavy rains or snow, derailments, rock and earth slides, washouts, and like unforeseen conditions beyond the control of the railroad corporation when the walkway is impaired or destroyed, including a reasonable time to permit necessary restoration; and

(3) at locations where the commission has authorized an impairment of standard clearance or where a permanent obstruction exists or has been placed or constructed alongside a track in such a location as to block the walkway partially or to prevent construction of the applicable standard walkway, provided that the available space between the impairment or obstruction and the track meets the applicable walkway standard in every respect except as prevented by the authorized impairment or obstruction.

(h) Applicability of requirements.

(1) Walkway requirements apply to all railroad corporations operation in the State of Texas.

(2) The commission may order walkways to be constructed and maintained along one or both sides of any railroad track where not otherwise required by these sections. Such walkways may be ordered when the commission determines, after opportunity for hearing, that local conditions present an undue safety risk that can be prevented or lessened by requiring a walkway.

(i) Variances for walkways.

(1) A railroad corporation may apply for a variance from the walkway requirements prescribed by this

section on a form to be prescribed by the commission. Such application shall be governed by the general and special rules of practice and procedure before the Transportation Division of the Railroad Commission of Texas, as they may be from time to time amended.

(2) The commission may approve such application for variance for good cause shown.